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FEE TRANSMITTAL

For FY 2006

☐ Applicant claims small entity status. See 37 CFR 1.27TOTAL AMOUNT OF PAYMENT (\$)2090.00**Complete if Known**

Application Number	<u>10/662,406</u>
Filing Date	<u>6/23/2003</u>
First Named Inventor	<u>Kowalch</u>
Examiner Name	<u>Mullen</u>
Art Unit	<u>3723</u>
Attorney Docket No.	<u>16-343</u>

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FEE CALCULATION**1. BASIC FILING, SEARCH, AND EXAMINATION FEES**

Application Type	FILING FEES		SEARCH FEES		EXAMINATION FEES		Fees Paid (\$)
	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	Fee (\$)	Small Entity Fee (\$)	
Utility	300	150	500	250	200	100	
Design	200	100	100	50	130	65	
Plant	200	100	300	150	160	80	
Reissue	300	150	500	250	600	300	
Provisional	200	100	0	0	0	0	

2. EXCESS CLAIM FEES**Fee Description**

	Fee (\$)	Small Entity Fee (\$)
Each claim over 20 (including Reissues)	50	25
Each independent claim over 3 (including Reissues)	200	100
Multiple dependent claims	360	180

Total Claims **Extra Claims** **Fee (\$)** **Fee Paid (\$)**_____ - 20 or HP = _____ x _____ = _____
HP = highest number of total claims paid for, if greater than 20.**Indep. Claims** **Extra Claims** **Fee (\$)** **Fee Paid (\$)**_____ - 3 or HP = _____ x _____ = _____
HP = highest number of independent claims paid for, if greater than 3.**3. APPLICATION SIZE FEE**

If the specification and drawings exceed 100 sheets of paper (excluding electronically filed sequence or computer listings under 37 CFR 1.52(e)), the application size fee due is \$250 (\$125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

Total Sheets	Extra Sheets	Number of each additional 50 or fraction thereof	Fee (\$)	Fee Paid (\$)
_____	_____	_____	_____	_____

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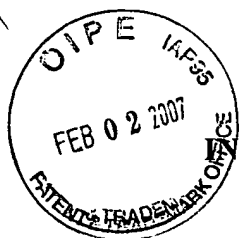
4. OTHER FEES(S)Non-English Specification, \$130 fee (no small entity discount) 4 month Ext. fee **Fees Paid (\$)**Other (e.g., late filing surcharge): Appeal Brief 1590.00
500.00**SUBMITTED BY**

Signature	<u>[Signature]</u>	Registration No. (Attorney/Agent)	<u>33,133</u>	Telephone	<u>216-371-4878</u>
Name (Print/Type)	<u>JEANNE E. LONGMIRE</u>	Date	<u>1/29/02</u>		

This collection of information is required by 37 CFR 1.136. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 30 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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PATENT



THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES

In re Patent Application of : James Kovach) Examiner: Bryan R. Muller
Serial No.: 10/602,406)
Filed: June 23, 2003) Art Unit: 3723
For: Tub Drain Wrench) Atty Dkt: 16-343

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APPEAL BRIEF

Applicant hereby appeals the Final Rejection, dated January 27, 2006, of the above mentioned Application. The Notice of Appeal received a filing date of July 27, 2006. Attached is an Appeal Brief which is believed in compliance with MPEP §1205.2 (8th Ed., Rev. Aug. 2006). Applicant respectfully requests the necessary extension of time which is required, and is filing the required extension fees.

The following items are included in this Appeal Brief, beginning on the pages set forth:

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I hereby certify that this document (along with any documents referred to as being attached or enclosed) is being mailed via first class United States Mail, postage pre-paid, in an envelope directed to the US Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450 on this 29th day of January, 2007.

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Signature

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(C) Real Party in Interest

The Applicant inventor of the above mentioned Application has made an assignment of this Application to his employer, Superior Tool Corporation, having an office at 100 Hayes Avenue, Suite C, Cleveland, Ohio, the real party in interest.

(D) Related Appeals and Interferences

None.

(E) Status of Claims

Claims 1-9 and 12-18 have been canceled.

Claim 21 is objected to due to a correctable informality.

Claims 10, 11 and 19-22 are pending, on appeal, and have the following status:

Claims 10, 11 and 19-22 are finally rejected under 35 U.S.C. 103(a) as unpatentable over U.S. Patent No. 4,237,754 to Battrick ("Battrick") in view of U.S. Patent No. 6,698,317 to Machovsky ("Machovsky"), U.S. Patent No. 6,269,717 to Bollinger ("Bollinger") and U.S. Design Patent No. 311,315 to Duke ("Duke").

(F) Status of Amendments

There are no outstanding amendments. Claims 10, 11 and 19-22 were finally rejected in a Final Office Action dated January 27, 2006.

(G) Summary of Claimed Subject Matter

Claims 10, 11 and 19-22 of the present application recite a drain spud wrench and drain spud wrench assembly having an improved solid wrench body with two different sized end portions for engagement with two different sized drains, with each end portion additionally configured for engagement with two different standard sized socket drives.

The drain spud wrench (10) of Claims 10, 21 and 22, and the drain spud wrench assembly of Claims 11, 19 and 20, and as shown in Figures 2-4, each include a wrench body(12) having a longitudinal axis (A) and first and second end portions, 14, 16. The first end portion (14) extends from the wrench body (12) and has a first plurality of projections (36) that define first and second transverse channels (48, 50) for receiving the cross-shaped portion of a drain spud. A first polygonal recess (28) sized to accept a standard sized socket drive (92), as shown in Figure 5, and is defined radially inward and axially spaced from said first and second transverse channels (48, 50). A second polygonal recess (60) that is smaller than said first polygonal recess (28) and is defined axially inward of said first polygonal recess is also provided. The second recess (60) is also sized to accept a standard sized socket drive, but smaller than the first recess. The second end portion (16) extends from said wrench body (12) in a direction opposite from the first end portion (14). The second end portion (16) includes a second plurality of projections (68) that define comparable third and fourth transverse channels for receiving a cross-shaped portion of a drain spud of second size, different from the first. A third polygonal recess (22) sized to accept a standard sized socket drive is defined axially inward of the third and fourth generally transverse channels. A fourth polygonal recess (84) that is smaller than the third polygonal recess (22) and defined axially inward of the third polygonal recess, but being sized to accept a smaller standard sized socket drive, is also provided.

In Claims 11, 19 and 22, the drain spud wrench assembly is further recited as including a socket driver (24) and a socket drive extension (88) which, as shown in Figure 5, is removably connected to the socket driver.

Further specific identification of the structures recited in the claims is referenced with respect to the Figures and Specification as follows:

Claim 10: At least Figures 2-4; and at least Page 3 beginning at Line 13 through Page 6, Line 2.

Claim 11: At least Figures 5 and 6, and at least Page 3, beginning at Line 13 through Page 6, Line 11.

Claim 19: At least Figures 2-5, and at least Page 4, Lines 1-16 and Page 5, Lines 8-24.

Claim 20: At least Page 4, beginning at Line 1 through Page 5, Line 4, and Page 5, Line 19 through Page 6, Line 11, and Figures 2-6.

Claim 21. Figures 2-6, and at least Page 3 beginning at Line 13 through Page 6, Line 2.

Claim 22. Figures 2, 4, and at least Page 5, Lines 8-9 and Page 6, Lines 1-2.

(H) Grounds of Rejection to be Reviewed on Appeal

Whether Claims 10, 11 and 19-22 are improperly rejected under 35 U.S.C. 103(a) as unpatentable over U.S. Patent No. 4,237,754 to Battrick (“Battrick”) in view of U.S. Patent No. 6,698,317 to Machovsky (“Machovsky”), U.S. Patent No. 6,269,717 to Bollinger (“Bollinger”) and U.S. Design Patent No. 311,315 to Duke (“Duke”)?

(I) Argument

Claims 10, 11 and 19-22 are improperly rejected under 35 U.S.C. 103(a) as unpatentable over Battick in view of Machovsky, Bollinger and Duke, and this rejection should be reversed.

A. The rejection of Claims 10, 11 and 19-22 as obvious over Battick in view of Machovsky, Bollinger and Duke is believed improper, and should be reversed. Independent Claim 10 recites a drain spud wrench having a wrench body with a longitudinal axis, and a first end portion extending from the wrench body. The first end portion includes a first plurality of projections that define first and second transverse channels for receiving a cross-shaped portion of a drain spud. The first end portion also includes a first polygonal recess sized to accept a standard sized socket drive is defined radially inward and axially spaced from the first and second transverse channels, and a second polygonal recess that is smaller than the first polygonal recess, defined axially inward of said first polygonal recess, and sized to accept a standard sized socket drive. The wrench body also includes a second end portion extending from the wrench body in a direction opposite from the first end portion, and having a second plurality of projections that define third and fourth transverse channels for receiving a cross-shaped portion of a drain spud of second size. The second end portion also includes a third polygonal recess sized to accept a standard sized socket drive defined axially inward of the third and fourth generally transverse channels, and a fourth polygonal recess that is smaller than the third polygonal recess, defined axially inward of the third polygonal recess, and sized to accept a standard sized socket drive.

To establish a *prima facie* case of obviousness there must be some teaching, suggestion or motivation to combine the references. The teaching, suggestion, or motivation must be found

either explicitly or implicitly in the references themselves or in the knowledge generally available to one of ordinary skill in the art. *See* MPEP §2142 and §2143.01. (8th Ed., Rev. Aug. 2006). Such a requirement serves to guard against using hindsight in an obviousness analysis. *In re Kahn*, 441 F.3d 977, 78 USPQ2d 1329 (Fed. Cir. 2006). The present combination of Battrick with any or all of Machovsky, Bollinger and Duke fails to provide the necessary teaching, suggestion or motivation to make the resulting combination alleged in the Final Office Action. Specifically, while Battrick may provide a tubular spud wrench having first and second end portions having projections defining transverse channels, as was disclosed in Applicant's Figure 1 as Prior Art, Battrick fails to disclose first and second, or third and fourth polygonal recesses, two on each of the first and second end portions, for accepting standard sized socket drives.

Lacking the polygonal recesses for accepting a socket drive, the Final Office Action suggests Machovsky discloses a plumbing tool with a single polygonal recess for a socket drive. However, the Final Office Action fails to consider that Machovsky, while teaching the use of a recess for a socket drive, has only one end opposite the recess for engagement with the necessary plumbing parts. Thus, Machovsky is a single ended tool, and not a double ended tool like Battrick or the invention of Claim 10.

Despite these failed comparisons, the Final Office Action forges ahead stating further that Duke discloses a tub strainer wrench with projections and channels "similar to the Battrick and Machovsky tools" and "further discloses that both sides comprise polygonal recesses sized to accept a socket drive...." (Final Office Action at Page 3.) Again, this is not the case. Although the Final Office Action appears to be willing to broadly interpret the teachings of Duke when it serves its own purpose (Page 8, Paragraph 12 regarding whether the recess in Duke passes

through the entire tool), respectfully, there is no “teaching” in Duke regarding engagement with a socket drive. Duke provides a double ended tub strainer wrench with a multi-positionable handle. By the language and figures in Duke, the illustrated handle – shown engaged at both ends of the Duke tool – is for engagement with the illustrated polygonal recess. Despite the implication in the Final Office Action, Page 8, Paragraph 12, the use of a second recess in Duke would teach away or destroy the Duke reference, as the Duke reference illustrates only the single recess at each end for engagement with a single multi-positionable handle. One advantage of the handle is that it may be used at both ends. The use of a larger recess outside the smaller recess shown could enable undesired transverse or non-axial movement of the handle during rotation. Such undesired movement may be prevented if the handle were able to pass through the entire tool to provide additional support along the axial length of the handle, but as indicated in the Final Office Action, no such disclosure is fully provided in Duke. Likewise, the handle shown in Duke is not disclosed as a socket drive, and the combination of Battrock with Machovsky and/or Duke does not result in the invention of Claim 10 or render it obvious.¹

Still lacking a reference illustrating two differently sized polygonal recesses at each end of a spud wrench, as in Claim 10, the Final Office Action suggests at Page 4 that Bollinger, which discloses a tool adapter, and not a spud wrench of any sort, has the two necessary axially aligned polygonal recesses, and thus, the Bollinger references, combined with Battrock, and the

¹ It is noted that Page 9, Paragraph 14 of the Final Office Action states that the Duke and Machovsky references are used “only as secondary references that teach similar advantages, but does not combine the two references together.” It is respectfully pointed out that the presentation of the references beginning at Page 3 of the Final Office Action indicates that the tool of the primary Battrock reference is proposed to be modified by the tool of the secondary Machovsky reference which is proposed to be modified by the tool of the secondary Duke reference which is proposed to be modified by the tool of the secondary Bollinger reference. As a result, it is relevant that the modifications to Machovsky (a one ended tool) should not be improperly applied to (or not be combined with) the two ended tool of Duke. To the extent the “combination” language used by Applicant was not understood, this clarification should be of assistance. To the extent there was a meaning intended by the citation of the four patent references at Page 2, Paragraph 3, other than that their combination forms the basis for the rejection of Claims 10, 11 and 19-22, Applicant requests that clarification be provided or the erroneous rejection be reversed.

selected features of Machovsky and Duke, render the Claim 10 invention obvious. However, the addition of the two polygonal recesses of the Bollinger adapter is yet another failed attempt which does not provide the invention of Claim 10 or render it obvious. Bollinger is not a spud wrench, the addition of certain, selected features of which may be combined with Battrick, Machovsky or Duke. Still further, Battrick uses a different means of turning the tool, with an attached slide bar through the center of the shaft. Battrick does not require the use of a socket drive, since an alternate means of turning is taught. Although the Final Office Action argues (Page 9, Paragraph 13) that the use of a socket drive is taught by Machovsky, the Machovsky reference teaches the use of a socket drive on only one end of a one-ended tool, and not in a tool having two working ends. The proposed modification would render the invention being modified unsatisfactory for its intended purpose, and thus the modification is improper. *In re Gordon*, 221 USPQ 1125 (Fed. Cir. 1984).

Second, even if the combination of Battrick and Bollinger were appropriate, Bollinger discloses the use of two polygonal recesses, whether in an adaptor (Figs. 1 or 2) or in a tool (Figs. 4 or 5), solely in a one ended driver tool. Although Bollinger may state that “any tool end” may be modified, the reference is singular, not plural, and Bollinger does not show or suggest that both or multiple tool ends of Battrick would be modified, since the one ended driver tool of Bollinger would not render this possible. The combination of Battrick, Machovsky, Duke and Bollinger is the type of hindsight reconstructive analysis that the requirement for reference specific teachings, suggestions or modifications was intended to prevent. The cited references and their combination do not render Claim 10 obvious, and the rejection of Claim 10 should be reversed.

B. Reversal of the improper rejection of Claim 11 is also requested. In Independent Claim 11, a drain wrench assembly having a socket driver and a socket drive extension are recited together with a solid drain wrench body as previously described. Again, although the Final Office Action at Page 5, Paragraph 5 indicates that all of the Battrick, Machovsky and Duke wrenches are solid, this is not the case. Battrick is a hollow tube. There is no motivation to provide the hollow tool of Battrick, which is manufactured utilizing "a tubular shaft" (Col.1, Line 63), as a solid wrench body. Machovsky is a tool with only one end for engagement with a drain, which end is a hollow tube. As previously discussed, although the Final Office Action (Page 8, Paragraph 12) indicates that there is no disclosure in Duke that the recess passes through the entire tool, it is at best unclear from Figures 3 and 4 whether the tool is in fact hollow like Battrick and Machovsky. If in fact the recess was filled, conventional shading could have been expected in Figure 3 and 4 to illustrate a surface at the end of the recess. Either conclusion seems uncertain. The Battrick, Machovsky, Duke and Bollinger combination again proposed in the Final Office Action to render Claim 10 invalid, likewise fails with respect to Claim 11 for the reasons previously discussed. The Claim 11 rejection should be reversed.

C. Reversal of the improper rejections of Claims 19 and 20 are requested. Claims 19 and 20 are believed to depend from non-obvious Claim 11, which should be allowed over the combination of Battrick, Machovsky, Duke and Bollinger for the reasons previously provided, and that they add further limitations, and should thus be allowed.

D. Reversal of the rejection of Claim 21 as obvious in view of Battrick, Machovsky, Duke and Bollinger is requested. Independent Claim 21 recites the drain spud wrench as a sold polygonal wrench body having a longitudinal axis, and a first end portion extending from the wrench body. The first end portion includes a first plurality of projections that define first and

second transverse channels for receiving a cross-shaped portion of a drain spud. The first end portion also includes a first polygonal recess sized to accept a standard sized socket drive is defined radially inward and axially spaced from the first and second transverse channels, and a second polygonal recess that is smaller than the first polygonal recess, defined axially inward of said first polygonal recess, and sized to accept a standard sized socket drive. The wrench body also includes a second end portion extending from the wrench body in a direction opposite from the first end portion, and having a second plurality of projections that define third and fourth transverse channels for receiving a cross-shaped portion of a drain spud of second size. The second end portion also includes a third polygonal recess sized to accept a standard sized socket drive defined axially inward of the third and fourth generally transverse channels, and a fourth polygonal recess that is smaller than the third polygonal recess, defined axially inward of the third polygonal recess, and sized to accept a standard sized socket drive.

Again, as set forth above, the hollow tubular tools of Battrick and Duke, and substantially hollow one ended tube tool of Machovsky are not properly combined with Bollinger. The suggestion to combine references must not be derived by hindsight from knowledge of the invention itself. Interconnect Planning Corp. v. Feil, 774 F.2d 1132, 1143 (Fed. Cir. 1985) ("When prior art references require selective combination by the court to render obvious a subsequent invention, there must be some reason for the combination other than the hindsight gleaned from the invention itself.") The combination of Battrick with Machovsky, Duke and Bollinger does not, without hindsight reconstruction of individual, selected elements from the cited references to form a mosaic having the recited features, result in the invention of Claim 21 or render it obvious. Claim 22 depends from Claim 21 and adds the additional feature that the ends are of different sizes, and is also not obvious. Reversal of these rejections is requested.

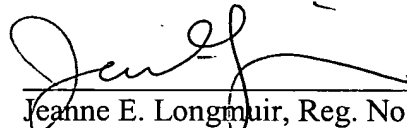
E. Conclusion

A review of the cited references indicates that certain and specific teachings, suggestions or modifications of the recited features of the claimed invention are not disclosed by the Battrick reference. Moreover, there is no teaching, suggestion or motivation provided in the cited Battrick reference or to combine additional features from the Machovsky reference, or the further Duke and Bollinger references. Applicant's invention in Claims 10, 11 and 19-22 is not obvious and these improper rejections should be reversed.

Respectfully Submitted,

Date: _____

1/29/2007



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CLAIMS APPENDIX

The claims involved in this appeal are as follows:

- 1.-9. (canceled)
10. (original) A drain spud wrench, comprising:
- a) a wrench body having a longitudinal axis;
 - b) a first end portion extending from said wrench body having a first plurality of projections that define first and second transverse channels for receiving a cross-shaped portion of a drain spud;
 - c) a first polygonal recess sized to accept a standard sized socket drive defined radially inward and axially spaced from said first and second transverse channels;
 - d) a second polygonal recess that is smaller than said first polygonal recess defined axially inward of said first polygonal recess, said second recess being sized to accept a standard sized socket drive;
 - e) a second end portion extending from said wrench body in a direction opposite from said first end portion, said second end portion includes a second plurality of projections that define third and fourth transverse channels for receiving a cross-shaped portion of a drain spud of second size;
 - f) a third polygonal recess sized to accept a standard sized socket drive defined axially inward of said third and fourth generally transverse channels; and
 - g) a fourth polygonal recess that is smaller than said third polygonal recess defined axially inward of said third polygonal recess, said fourth being sized to accept a standard sized socket drive.

11. (previously amended) A drain spud wrench assembly comprising:
- a) a socket driver;
 - b) a socket drive extension removably connected to said socket driver;
 - c) a drain wrench including:
 - i) a solid wrench body having a longitudinal axis,
 - ii) a first end portion extending from said wrench body in alignment with said longitudinal axis comprising a structure configured to engage a drain spud; said first end portion defining at least two polygonal recesses configured to accept different sized socket drives; and
 - iii) a second end portion extending from said wrench body in a direction opposite from said first end portion and comprising a structure configured to engage a drain spud of second size, said second end portion defining at least two polygonal recesses configured to accept different sized socket drives.

12.-18. (canceled)

19. (previously presented) The drain spud wrench assembly of Claim 11, wherein said first and second end structures configured to engage a drain spud are comprised of a plurality of projections that define a series of transverse channels.

20. (previously presented) The drain spud wrench assembly of Claim 19, wherein polygonal recesses defined in the first and second end portions are axially inward and axially spaced from said transverse channels.

21. (previously presented) A drain spud wrench comprising:
- a) a solid polygonal wrench body having a longitudinal axis;
 - b) a first end portion extending from said wrench body comprising:
 - i) a plurality of projections that define first and second transverse channels for receiving a cross shaped portion of a drain spud;
 - ii) a first circular extension of said first end portion, where the first circular extension includes four slots aligned with gaps between said projections, said slots extend from a face of the first end portion, and are sloped radially outward; and
 - iii) a first and second polygonal recess extending axially inward from the face of said first end portion, forming a first and second polygonal receptacles, where said first polygonal receptacle is configured to accept a standard socket driver and said second polygonal receptacle extends axially inward from the first polygonal receptacle and configured to accept a smaller socket driver than the first polygonal receptacle;
 - c) a second end portion extending from said wrench body comprising:
 - i) a plurality of projections that define third and fourth transverse channels for receiving a cross shaped portion of a drain spud;
 - ii) a second circular extension of said second portion, where the second circular extension includes four slots aligned with gaps between said projections, said slots extend from a face of the second end portion, and are sloped radially outward; and

- iii) a third and fourth polygonal recess extending axially inward from the face of said second end portion, forming a third and fourth polygonal receptacles, where said third polygonal receptacle is configured to accept a standard socket driver and said fourth polygonal receptacle extends axially inward from the third polygonal receptacle and configured to accept a smaller socket driver than the third polygonal receptacle.

22. (previously presented) The spud drain wrench of Claim 21, wherein, the first and second end portions are of different size.

EVIDENCE APPENDIX

NONE

RELATED PROCEEDINGS APPENDIX

NONE